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FOR THE NINTH CIRCUIT.

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Plaintiff in Error.

vs.

CHARLES ALTSCHUL,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

In Error to the Circuit Court of the United States for the District of Oregon.

WILL R. KING, F. M. SANTON
AND S. T. JEFFREYS,
Attorneys for *Plaintiff in Error.*
WILLIAMS, WOOD & LINTHICUM
AND T. C. DUTRO,
Attorneys for *Defendant in Error.*

BOWEN & SMALL, PRINTERS, BAKER CITY, OR.

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Statement of the Case.

This is an action of ejectment brought by the *Defendant in error*, Charles Altschul, against *Plaintiff in error*, J. D. Osborne.

Said Altschul in his complaint (see page 5 of Transcript) alleges that he is the owner in fee simple of the north half of section one in T. 19, South, Range 43, E., in Malheur County, Or., containing 320 acres, and is entitled to the immediate possession thereof; that said Osborne is wrongfully in possession of all of said premises and wrongfully withholds possession thereof, and that he (the plaintiff) is damaged in the sum of $3500.00.

The said J. D. Osborne in his answer specifically denies each of the allegations of the complaint, except the situation, and description of the land; and that he is in possession of 160 acres thereof and disclaims any interest in any of the 320 acres of land described in the complaint, except the 160 acres specified in the answer, pages 7 and 14 of Transcript); and alleges that he is the owner thereof in fee simple.

And as a further and separate defense Osborne alleges that Altschul is barred by the Statute of Limitations from claiming said portion of the premises; and as a second further defense alleges settlement and claim of said portion of the premises under the Homestead Laws of the U. S.

prior to the taking effect of the grant to the Willamette Valley and Cascade Mountain Wagon Road Company, (Altschul's grantor) and that the same was excepted thereby from operation of the grant (pages 9 and 11 of Transcript).

To this second defense Altschul demurred on the grounds that it did not state facts sufficient to constitute a defense, (pages 11 and 12 of Transcript), which demurrer was sustained and *plaintiff in error* refused to amend as to this defense.

Plaintiff (Altschul) in his reply denied the allegation of the adverse possession of Osborne, to the portion of land described, in the following words, to wit:

"Denies that defendant and his grantors and predecessors in interest have held actual, open, notorious, continuous, adverse or exclusive possession to plaintiff and plaintiff's grantors and predecessors in interest, of said lands last above described, under claim of ownership and color of title, at all times since the day of October, 1870, or at all, or continues to hold the same."

The cause proceeded to trial on these issues before a jury duly impannelled; the jury brought in the following (sealed) verdict. (page 21 and 22 of Transcript) "We, the duly impannelled jury in the above-entitled action, find a verdict for the plaintiff."

Seven (7) days thereafter, (Jan. 5, 1898) and

within the time allowed by the court, the said J. D. Osborne, by his counsel, filed a motion for arrest of judgment, that the verdict be set aside and a new trial ordered on the grounds that, "The verdict of the jury * * * is uncertain, irregular, insufficient and does not determine the issues in the case." Page 23 of Transcript.)

Two (2) days after said motion for new trial was filed, (Jan. 7, 1898), and after the jury had been discharged, plaintiff (Altschul) by his counsel filed a motion for the *Court* to amend the verdict so as to read as follows: "We the jury in the above-entitled cause, find that the plaintiff is the owner in fee simple and entitled to the immediate possession of the following described land, situated in the county of Malheur and State of Oregon, to wit: The north half of section one, in township nineteen, south of range forty-three, east of the Willamette Meridian." (Pages 25, 26 of Transcript).

Thereafter on the 21st day of January, 1898, the motion for a new trial and motion to amend the verdict came before the court; the motion to set aside the verdict and grant a new trial was denied, but the motion to amend the verdict was allowed (without recalling the jury and without affidavits of jurors as to their intention, etc.), and judgment entered thereon.

The order of the court to amend the verdict and

the judgment on the verdict as amended, are set out in full on pages 28, 30 and 31 of Transcript Record.

The refusal of the court to allow the motion of *plaintiff in error* to set aside the verdict, arrest of judgment and for a new trial; and the allowing of the motion of *defendant in error* to amend the verdict and the order and judgment of the court on the amended verdict are respectfully assigned as errors of the court below. (Page 41 of Transcript).

There is also another error (not referred to in assignment of errors, except so far as entering judgment against Osborne may include the same) of the court below, being that of sustaining the demurrer of *defendant in error* to Osborne's second defense. (Page 13 of Transcript).

In this connection we will ask your Honors that, even if it should be found that the last error above referred to is not specifically assigned and referred to in "Assignment of Errors" in the Transcript, that it may also be considered in this cause under subdivision 4 of Rule 24 of Court of Appeals, as "a plain error not assigned or specified."

Points and Authorities.

1. A verdict of a jury in an action of ejectment shall be as follows:

"1. If the verdict be for the plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be.

"2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property, or part thereof, or license or right to the possession of either, established on the trial by the defendant, if any, in effect as the same is required to be pleaded."

Hill's Code, (Or.) Section 320 (317).

2. A *verdict* in an *action of ejectment* which does *not* give the *nature* and *duration* of the estate, nor *describe* the land awarded, but merely "finds a verdict for the plaintiff," *is fatally defective and a new trial should be granted.*

Pensacola v. Perry, 120 U. S. 318,

Sedgwick & Wait on Trial of Land Titles, Sec., 500,

Rawlins v. Bailey, 15 Ill., 178,

Long v. Linn, 71 Ill., 152,

Cincinnatti H. & I. R. Co., v. Clifford, 113 *Ind.* 460, *S. C.* 15 *N. E.* 524,

Lungren v. Brownlie, 22 *Fla.*, 491.

Fossen v. Pearson et. al. 4 *Sneed* 362,

River v. Pugh, 7 *Heisk (Tenn.)* 715,

De Clementi et. al. v. Winstanley, 28 *N. Y., Sup.* 513.

(Also authorities cited under point 4).

3. The general question here raised *as to the sufficiency of the verdict* in an action of ejectment rendered by the jury (in the form rendered in the case at bar) has never been determined by the Supreme Court of Oregon, but the *principle* involved has been determined by said court.

Jones v. Snyder, 8 *Or.*, 127,

Phitts v. Taylor, 15*Or.*, *Page* 484.

Smith v. Smith, 17 *Or.*, 444.

4. The *verdict* of the jury in the case at bar, by merely finding "*a verdict for plaintiff*," with no further explanation as to their intent, is silent as to the *right of property, right of possession, nature and duration of the estate and possession, amount*

of damages and as to the *amount of property awarded* to plaintiff, if any. The court supplies this by its own verdict. Counsel, by asking for the *amendment* in these particulars, and the court by so amending, confess that they are substantial omissions.

After the verdict has been *recorded*, and the *jury discharged*, the *court has no power to supply substantial omissions by amendment;* and so to do would be to encroach upon the province of the jury.

Fitnam's Trial Procedure, Sec. 639, *page* 780.

Sedgwick & Wait's Trial of Land Titles. Sections 499, 500,

Fiore v. Ladd, 29 *Or.*, 528,

Long v. Linn, 71 Ill., 153, *(supra)*.

Rawlins v. Bailey, 15 Ill., 179, *(supra)*,

Wood v. McGuire's Children, 17 *Ga.*, 362,

Kerr v. Hartshorn, 4 *Yeates* 293,

Kob v. Wise, 71 *Ga.*, 105,

Shelton v. O'Brien, 76 *Ga.*, 821,

Gaither v. Wilmer, 71 *Md.*, 361, *S. C.* 5 *L. R. A.* 590,

Ford v. State, 12 *Md.* 532,

Central Law Journal Vol. 30, 25,

Clements v. Winstanley, 28 *N. Y. Sup.* 513,

Nickelson v. Smith, 15 *Or.* 200,

Dana v. Farrington, 4 *Minn.* 335,

Snowden v. McGuire, 22 *Fed. Dec.* 826,

Lungren v. Brownlie, 22 *Fla.* 491,

Cincinnatti H. & I. R. Co., v. Clifford, 113 *Ind.*, 460, *S. C.* 15 *N. E.* 528, *(supra)*,

Parker v. Lake Shore & M. S. R. Co., (Mich.) 53 *N. W.* 834,

5. The *evidence* and *records* in a case *cannot be looked into* to ascertain the intention of the jury *for the purpose of amending a verdict.*

Bennett v. *Seabright*, 32 *S. W.* 1049,

Gogan v. *Evans*, 33 *S. W.* 891,

DuBoise v. *Battle*, 34 *S. W.* 148,

Mays v. *Lewis*, 4 *Tex.* 38,

Brien v. *Bruce*, 5 *Tex. Civ. App.* 583, (and cases cited therein),

Smith v. *Tucker*, 25 *Tex.* 594,

Snowden v. *McGuire*, 22 *Fed. Dec.* 826 *(supra)*,

Wertz v. *Cincinnatti (Ohio C. P.)* 30 *Ohio L. J.* 280,

Fiore v. *Ladd*, 29 *Or.* 533. *(supra)*,

6. The *literal* and *conjunctive denial of defendant in error* in his reply, as to Osborne's claim of ownership by adverse possession for a period equal to the statute of limitations (see page 17 of Transcript and page 3 herein) is *insufficient to raise any issue* on that point as to the 160 acres claimed by *plaintiff in error;* and is a virtual admission of the allegation of title by "adverse possession" pleaded in *plaintiff in error's answer* as an affirmative defense. (Page 15 of Transcript).

Hill's Code, Sec. 72 (71), *page* 210,

Scoville v. *Barney*, 4 *Or.* 290, (and numerous cases therein cited)

Moser v. *Jenkins*, 5 *Or.* 449.

7. This admission by Altschul as to title in Osborne to the 160 acres in his (Osborne's) possession would at least leave it *uncertain as to whether the jury intended by their verdict* to give *defendant in error* (Altschul) the *immediate possession and title*

to the entire tract of 320 acres claimed in his complaint, or only a portion thereof, if any.

"It was legally impossible, therefore, for the court to render a proper verdict, and a verdict not sufficient for this purpose must be set aside."

Cincinnatti H. & I. R. Co. v. *Clifford*, 113 *Ind.* 460, *S. C.* 15 *N. E.* 528, *(supra)*

De Clementi v. *Winstanley*, 28 *N. Y. Sup. 513.*

8. Damages are *presumed, without proof* thereof.

Vol. 8, (*2nd Ed.*) *Am. Enc. Law*, 552 *and* 553, (and numerous authorities therein cited),

9. The court *erred in sustaintng the demurrer* to Osborne's *second further defense.* It should have been overruled.

Settlement and claim of the land by a *bona fide* settler under the Homestead Laws of the U. S. *at date of* the *taking effect of the* grant to Willamette Valley and Cascade Mt. Wagon Road Co. (Altschul's grantor and predecessor in interest) *excepts the same from operation of the grant.*

Emerson v. *Cen. Pac. R. R. Co.* 3 *L. D.* 117 271.

S. P. R. R. Co. v. *Lopez* 3 *L. D.* 130,

Ramage v. *Cen. P. R. R. Co.* 5 *L. D.* 274 & 616,

Johnson v. *Towsley*, 13 *Wall.* 90.

Under section 320 (317) of Hill's Annotated Laws of Oregon (quoted under point 1 herein), together with the authorities cited under points 2 and 3, there can be no doubt as to the *law requiring the verdict*, in an action of *ejectment*, to state the *nature and duration* of the estate, the *right* of the *possession*, if any, and the *portion* thereof intended to be awarded to either party. There is no conflict of authorities on this point, and as to a verdict rendered merely "for plaintiff," without further explanation, being fatally defective. The fact that counsel for *defendant in error* asked for the amendment, and the *court* amended the verdict, is in effect an admission that the verdict is defective.

A verdict of a *jury* in an *action in ejectment*, which does not conform to the requirements of the statute, as to the essential features thereof, *is fatally defective*, and a new trial should be granted.

On this point the statutes of Florida, Illinois and Tennessee are in effect the same as that of Oregon. In the case of *Pensacola* v. *Perry*, 120 U. S. 318, being an *action in ejectment*, the jury did not state the quantity of the estate nor describe the land, but merely found "for the plaintiff." Judgment was entered on the verdict, which was assigned as error. The Supreme Court *reversed* the judgment and remanded the case for new trial. The same view

was taken by the courts in *Cincinnatti H & K. Co. v. Clifford*, 113 *Ind.* 460, *Long v. Linn*, 71 *Ill.* 178, *Rawlins v. Bailey*, 15 *Ill.* 152, *Lungren v. Brownlie*, 22 *Fla.*, 491, *River v. Pugh*, 7 *Heisk* (*Tenn.*) 715, *Fossen v. Pearson*, 4 *Sneed*, 362, *De Clementi v. Winstanley*, 28 *N. Y. Sup.* 513.

The identical question, *in actions of ejectment*, as now presented in the case at bar, has never been determined by the Supreme Court of the State of Oregon, but the principle has been determined by said court.

The case of *Jones* v. *Snyder* (cited under point 3) 8 Or., 127, passes on this point in an action of replevin. The statute of Oregon, section 214 (211) specifies what the verdict of the jury shall contain when in favor of the plaintiff. In this case the verdict of the jury was: "We, the jury in the case of *E. A. Jones* v. *A. Snyder*, find for the plaintiff, and assess the damages at the sum of $300, and interest $111.67—total $411.67," thus failing to pass upon the *right* of property or its *value*, which are required by statute. Judgment was reversed and new trial ordered. This is followed and approved in the case of *Smith v. Smith*, 17 Or., 444.

This question is also discussed in *Phipps v. Taylor*, 15 Or., 487, in which Strahan J. says: "But this verdict is insufficient for another reason. By the complaint the plaintiffs claimed to be the owners of the lumber in controversy, as well as entitled

to its possession, the verdict is *silent as to the ownership* of the property, and *that issue remains undetermined.* In such case no judgment can be rendered for plaintiffs." We submit that as the Supreme Court of Oregon in the case just cited, when the verdict of the jury in replevin found as follows: "That the defendants are entitled to the following described property in the plaintiff's complaint described, to-wit: (3-5) Three-fifths of each and every pile of clear of lumber described in plaintiff's complaint, or its value thereof, and the remainder belongs to the plaintiffs," (page 485, 15 Or.) held that the verdict was *insufficient and that no judgment* could be rendered thereon, because it did not find as to the *ownership,* that therefore, in an *action in ejectment like the one at bar,* where the *attempted verdict* finds only "for plaintiff" and does not state the *nature* of the estate, as to who the *owner* may be, as to who may be *entitled to possession* of the lands, nor as to whether *damages* are allowed, or disallowed, (when the statute clearly requires it,) the Supreme Court of Oregon would certainly hold, that *the judgment is insufficient* and that *no judgment could be rendered thereon.*

The Court cannot amend a verdict of a jury by supplying substantial omissions,

While the courts have in many cases held that a verdict of a jury may be amended as to *form,* all

leading cases and recent decisions on the question agree in holding that *after a verdict has been recorded and the jury discharged* the *court* in an *action at law*, has no power to amend the verdict as to *substance*, and *no power to supply substantial omissions by amendment;* and that to do so would be to *encroach upon the province of the jury.* (See numerous authorities cited under point 5, herein.)

Fitnam's Trial Procedure, one of the most recent works on the subject, at page 780, section 639, says: "But the power of the court over the verdict as to its correction is properly limited to the application of the verdict to the proper count, where the complaint is composed of several counts, some of which are good and some bad, or where the causes of action in separate counts are inconsistent. It may also be used to correct mistakes apparent on the face of the verdict, such as misspelling, etc. So, where the verdict is incorrect in form, the court has the power to put it in legal form, *provided that no change is made as to substance.*"

Sedgwick & Waite's Trial of Land Titles, section 499 says, "a court may mould a verdict, *not changing it as to substance.* * * * * * Also, on that point, see section 500, *id.*

The case of *Long v. Linn, 71 Ill., 153, (supra)* is a case direct in point; this was an action of ejectment. The statute of Illinois is, in effect, the

same as the Oregon statute. The jury brought in a verdict in the following form: "We, the jury, empanneled, in the case of Thomas Linn by his guardian, against John Long, find a verdict for plaintiff."

The supreme Court on this point says: "From this provision of the law, it will be seen that this finding of the estate held by plaintiff is not form, and the provision of the practice act, that the court may direct the clerk to reduce the verdict to form, does not apply. The finding of the *title* is of the *essence of the verdict* and if omitted by the jury, they may be sent back with directions to find the title and if they fail to do so no judgment can be rendered upon such a verdict. If the court would supply the want of such a finding it would encroach upon the province of the jury." Judgment was accordingly reversed and new trial ordered.

The same principle was determined in the case of *Rawlins v. Bailey, 15 Ill., 179, Fossen v. Pearson, 4 Sneed, 362, River v. Pugh, 7 Heisk, 715, Cincinnatti v. Clifford, 113 Ind., 460, De Clementi v. Winstanley, 28 N. Y. S. 513.*

Decisions relating to the power of the court to *amend* in actions of *ejectment* where the facts are similar, or identical, with the case at bar are not numerous, but the same *principle* has often been before the courts of the various states on other propositions. For example the case cited above of

Fiore v. Ladd, 29 Or., 533, we think settles the question in Oregon as to the power of the *court* to amend a verdict of a jury. In the case of *Fiore v. Ladd* it was in effect admitted by the pleadings that if plaintiff was entitled to recover at all he would be entitled to a judgment for $800 with interest from a certain date, but the jury found for $800 only. The *court* amended the verdict so as to give the plaintiff interest also. On appeal to the Supreme Court Justice Bean says: "When, therefore, a verdict has been returned by a jury which expresses their intention, and they have been discharged, *the court is powerless to amend it, however erroneous it may be.* It must either *enter a judgment thereon, or set it aside and grant a new trial.*"

In the action of *Gaither v. Wilmer*, 71 Md. 361, S. C. 5 L. R. A. 390, (supra) the court says: "Without doubt a verdict in an action like the present, simply 'for the plaintiff,' without stating the damages or the amount the plaintiff is entitled to recover, *is fatally defective.* It is not merely an informal verdict which the court can mould into proper shape by referring to the pleadings and issues but is substantially defective."

In the action of *Parker v. Lake Shore & M. S. R. Co.*, (Mich) 53 N. E. 836, the court says: "There is no warrant for correcting a verdict *after the discharge of the jury.* Such a practice is open to serious objection and gross abuse. The *only*

remedy in such case is a motion for *new trial.*" It will be observed that the amendment complained of in the case of *Parker* v. *Lake*, etc., was amended on affidavit of jurors as to their intent.

The evidence in a case cannot be looked into for the purpose of correcting a verdict.

In the action of *Smith v. Tucker, 25 Tex. 594 (supra)*, the verdict of the jury found for the plaintiff "the land described in the petition, less seven hundred and sixty-seven and one-half acres, as described in the deed read in evidence from D. F. Hooper to C. M. Adams." It was held by the court on appeal that this verdict was too indefinite, and could not be aided by the deed referred to in evidence and thereby rendering certain the land to be recovered. This case is cited with approval in the case of *Gogan v. Evans, 33 S. W. 891, supra.* The same position is held in *Bennet v. Seabrook, 32 S. W. 1049, DuBoise v. Battle, 34 S. W. 148, Mays v. Lewis, 4 Tex. 38, Brien r. Bruce, 5 Tex. App. 583,* (and numerous cases cited therein,) *Snowden v. McGuire, 22 Fed. Dec. 826 and Fiore v. Ladd, 29 Or. 533.*

The above proposition is so just and reasonable that it hardly seems probable that it will be disputed. If a court will be permitted to look into the *evidence* for the purpose of ascertaining the *in-*

tention of a jury, and to amend a verdict of a *jury* accordingly, it would clearly be an invasion of the province of the jury, as the *jury* is the *sole* arbitrators of the facts. However erroneous may be the verdict of a jury—even though they should fail to follow the instructions of the court as to questions of law involved—the *only* remedy is to grant a *new trial*. For if the court, under the *pretense* of "moulding into form," can make a verdict as to matters of *substance*, and examine into the evidence to ascertain what the verdict *should be*, then *why the necessity of a jury at all!* In fact to establish a *precedent* permitting the courts to supply *substantial omissions* in verdicts, and thereby make the verdict—which the jury may have failed or neglected to do—will eventually, *in effect*, abolish the *jury system* and substitute the *will of the court* in its stead. Whatever may be the necessity, *if any*, of substituting the decision of the *court* for that of the *jury*, it certainly will *not* be contended that it is within the province of the *court* to make this change in our system of jurisprudence. To do so would be to *legislate* upon what *some* persons may think the law *should be*, rather than to determine *what the law is*.

Even if the court should be permitted to look into both the pleadings and evidence, in the case at bar, it would be impossible to ascertain the intention of the jury in rendering their attempted verdict.

Should it be possible to find authorities holding that a court can amend a verdict of a jury as to *substance*, no one would contend that such could be done without *first* ascertaining the *intention* of the jury. In the case at bar the *jurors* neither testified, nor made affidavits, as to what they intended to find, when they said by their *attempted* verdict that they found "for the plaintiff."

Let it not be overlooked that plaintiff, Altschul, in his complaint *claims* both the *title* and *right of possession* of the entire premises; and alleges, that defendant, Osborne, wrongfully retains possession of *all* of the said *320* acres of land described in the complaint, and demands judgment against Osborne for damages for the alleged detention thereof. Defendant, Osborne, in his answer denies plaintiff's right to *any* of said lands, or right of possession; and alleges *title* and *possession* in himself to *160* of the said *320* acres claimed in the complaint, and denies and *disclaims* any right to the balance thereof. Osborne further alleged title by "adverse possession" for the period prescribed by the Statute of Limitations. Altschul in his reply—quoted on page 3 of this brief—fails to deny Osborne's title by reason thereof. Under the Oregon authorities

cited under point 6 Altschul is in the same position as if he had not attempted to deny Osborne's allegation regarding title and right of possession by "adverse possession." For example he denies that Osborne *and* his grantors have held the land for the period prescribed by the Statute of Limitations under *color of title and claim of ownership.* This may be a denial as to it being held under *both* "claim of ownership" *and* "color of title," but not a denial that he has held under either. To hold the property for the period, and in the manner alleged in the answer, (see page 15 of Transcript) under *claim of ownership* is sufficient, without "color of title." See *Swift v. Mulkey*, 14 Or., 64, which says: "To be an adverse possession it must be an occupancy under claim of ownership, though it need *not* be under *color of title.*" While Altschul in his reply has denied that Osborne *and* his grantors *and* predecessors in interest held adversely, as alleged, as against Altschul, etc., it is not a denial that Osborne alone has held adverse possession for the required time.

Your Honors will observe that there are at least three general questions involved,

1. *Right* of property, { *a.* Nature of the estate, *b.* Quantity of the estate.

2. *Right* of possession, { *a.* Immediate. *b. In futuro.*

3. *Damages* claimed. { *a.* Nominal. *b.* Substantial.

In view of the above questions that arise under the statute and the pleadings in the case at bar, how could the court below ascertain the *intention* of the jury?

How did the court ascertain whether the jury intended to find that plaintiff, Altschul, is the *owner* of the premises, but not entitled to the *immediate* possession, or that Altschul was entitled to the *possession*, but was not the owner thereof? Or how could the court determine but that the jury intended to find that Altschul was both the owner *and* entitled to the possession of the 160 acres, to which Osborne disputed plaintiff's title and right of possession, but *dis*claimed any title or right of possession in himself, or that Altschul was the *owner* of that portion *dis*claimed by Osborne, but *not* entitled to the possession of the same?

It should not be overlooked that there were *two* different *tracts* of land in dispute, included in the 320 acres described in the complaint. This brings it within the rule laid down in *Cincinnatti H. & I. R. Co. v. Clifford, (Ind.) supra, 15 N. E. 524.* In this case the verdict of the jury read thus: "We, the jury, find for the plaintiff and assess his damages at forty-two dollars." Elliot J., at page 528 (N. E. Rep. Vol. 15) says: "Appellant's counsel insist that this verdict is insufficient, and that the

motion for *venire de novo* should have been sustained. We so hold. * * * * * The complaint claims title to 120 acres of land, but the other pleadings show that only a narrow strip is in controversy. * * * * * It was legally impossible, therefore, for the court to render the proper judgment, and a verdict not sufficient for this purpose must be set aside." See also *Braughan v. Braughan*, 15 N. E. 466, and numerous authorities therein cited to the effect that the *only* remedy is by granting motion for *new trial*.

Since Altschul has not legally denied Osborne's right to 160 of the 320 acres involved we are entitled to *judgment on the pleadings* in favor of Mr. Osborne for *said 160 acres*, hence the court erred in entering judgment for Altschul for the entire tract of 320 acres. There is certainly nothing to indicate that the *jury* intended so to find.

How could the court determine whether the jury intended to find for plaintiff as to right of possession of a *portion* of the property *only*, and *one cent* as *nominal damages* for the detention thereof by defendant, or for *right of possession only*, or that he is the *owner only* and not entitled to possession at all? Under section 322 (319) of Hill's Code, (Or.) plaintiff's right of possession, if any, might have expired after the commencement of the action, and before trial, in which event, "the verdict shall be given according to the fact, and judgment shall be

given only for damages." Under this statute how could it be determined but what the jury intended to give a verdict for *nominal damages*, and not for possession of any portion of the land whatever?

It is true, as admitted by stipulation in *Transcript*, that no evidence was introduced at the trial relative to damages, and that plaintiff, Altschul, may have *intended* to waive damages by neglecting to prove it; *but that does not affect the case at bar*, for, as, under authorities cited under point 5, page 9 herein, the court cannot examine into the *evidence* to ascertain the *intention* of the *jury*, hence the stipulation as to what the evidence may, or may not, have contained can cut no figure in this case.

Whether damages were *proved* or not is also immaterial, as the jury would have a right to find a verdict for *nominal* damages, to say the least, for "Wherever a right of action for damages is given by statute, damages will be *presumed*, though *none are proved*, where the cause of action is shown to exist."

Am. Eng. Enc. Law, Vol. 8, 2nd Ed. 552, (and numerous authorities therein cited.)

"The damages presumed by law for the violation of a right, in the absence of all proof of damage, * * * * are in amount only nominal." *Idem*, 553.

It necessarily follows, in the light of the decisions last above cited, that if *no* evidence was given by *either* plaintiff or defendant, at the trial, relative to *damages*, the *presumption* above referred to would *not* be overcome; and, *if plaintiff could recover at all*, he would have been entitled to *nominal* damages, at least; and it may have been the intention of the *jury* so to find when they found "a verdict for plaintiff."

It is then very clear that it is "legally impossible" for the court to ascertain the intention of the jury, on the numerous issues raised in the case, and that the amendment of the *attempted* verdict and judgment rendered thereon are absolutely void.

In fact, the *attempted verdict*, reported by the jury, *fails* to find on *any* of the *issues* whatever in the case at bar, as required by the Laws of Oregon, section 320 (317), and we, therefore, assert that it is *no verdict at all;* and the attempt on the part of the court below to amend, is but the rendering of *a verdict by the court*, after the jury had absolutely failed so to do, either in form or substance. After a careful examination of authorities of the courts of the United States we fail to find any case where the courts have amended a verdict by supplying all substantial omissions, as was done in this case,—especially where it is legally impossible to ascertain the intention of the jury as in the case at bar.

We submit that, from the authorities herein cited on the points involved, the judgment of the court below should be *reversed* and *either a new trial* ordered, or *judgment* entered in favor of the *plaintiff in error* for the 160 acres of land which the pleadings admit him to have acquired by adverse possession, and in favor of the *defendant in error* for the 160 acres of land whose possession and ownership is disclaimed by the *plaintiff in error*.

Respectfully submitted,

WILL R. KING,

F. M. SAXTON and

S. T. JEFFREYS,

Attorneys for *Plaintiff in Error*.